

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRUCE HETZEL)	
Claimant)	
VS.)	
)	Docket No. 1,047,533
KEYSTONE AUTOMOTIVE INDUSTRIES)	
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 27, 2009, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant requests temporary total disability benefits and medical benefits for an August 18, 2009, accident. At the October 20, 2009, preliminary hearing, respondent argued claimant did not provide proper notice of his accident to respondent and, therefore, claimant was not entitled to receive workers compensation benefits. And if the ALJ found claimant provided proper notice, respondent argued claimant was not entitled to receive temporary total disability benefits as he was allegedly terminated for cause. In the October 27, 2009, preliminary hearing Order, ALJ Klein found claimant sustained his burden of proof on the issue of notice and granted claimant temporary total disability benefits and medical benefits.

Respondent contends the ALJ erred. Respondent argues claimant did not provide proper notice of his accident to respondent within 10 days after its occurrence and, further, claimant is not entitled to an extension of that time period to 75 days for just cause.¹ If the Board finds claimant provided proper notice, respondent contends claimant is not entitled to receive temporary total disability benefits and the ALJ erred in awarding those benefits. Respondent requests the Board to reverse the October 27, 2009, Order.

¹ See K.S.A. 44-520.

Claimant requests the Board to affirm the Order. Claimant argues that, at the very least, respondent knew by August 21, 2009, that his back injury was very likely due to his work and that respondent knew claimant's back injury was preventing him from doing his job.

The only issues before the Board on this appeal are:

1. Did claimant provide proper notice of his accident to respondent?
2. Does the Board have the jurisdiction and authority at this juncture of the claim to determine whether claimant is entitled to receive temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

On August 18, 2009, while employed by respondent claimant suffered an accidental injury to his back from lifting a car hood. Claimant worked at Keystone Automotive Industries loading and delivering automotive parts. On August 18, 2009, claimant did not tell any co-worker or supervisor about the injury. He continued working his normal shifts and duties until August 21, 2009.

On August 21, 2009, claimant arrived at work in severe pain. Noticing how much pain the claimant was in, a co-worker suggested claimant go home. An hour into his shift claimant decided to leave work and go home. Before leaving he called his manager but only got voice mail. Claimant did not leave a message. Rather, he left a note on the warehouse manager's desk. The note read:

Mike whent [*sic*] Home
my Back Hurting Real Bad
BH²

Mike Wells, the warehouse manager, interpreted this note to mean the claimant was injured at work. As reflected in Mr. Wells' testimony at the preliminary hearing:

Q. (Mr. Wenger) When were you first aware that he [claimant] was alleging he was injured at work?

² P.H. Trans., Cl. Ex. 1.

A. (Mr. Wells) When I came to work on the 21st and found the note that he left.

Q. That note that you saw indicates that he had a back injury, right?

A. Correct.³

Upon further questioning, by respondent's attorney, Mr. Wells changed his testimony. He testified he did not know the back injury referred to in the note was work related.

On the morning of August 24, 2009, claimant went to Dr. Jansen, a chiropractor, due to continuing back pain. Dr. Jansen examined claimant and provided him with an absence authorization document. The document recommended claimant be excused from work until August 31, 2009, due to disc problems in his back. Claimant delivered the absence authorization document to respondent on August 24, 2009.

Claimant reported to work on August 31, 2009; however, he was so stiff he could not work. His co-worker encouraged him to go home. An hour into his shift, claimant did leave work and returned home and fell asleep. Upon waking, claimant telephoned his manager and left a voice mail stating, "I can't do it, my back hurts."⁴ The manager claims he did not receive the voice mail.

Claimant did not report to work on September 1, 2009. Later that day, claimant was informed his employment with respondent was terminated.

Respondent contends the claimant did not provide proper notice regarding his August 18, 2009, injury because he did not strictly comply with the requirements of K.S.A. 44-520 and, further, because of the Kansas Supreme Court's holding in *Bergstrom*⁵ that the plain and unambiguous language in the statute must be adhered to strictly.

Bergstrom does not construe K.S.A. 44-520 so its impact on the factual circumstances of this case is unclear. Moreover, the Kansas Supreme Court has held that the purpose of the notice statute is to afford the employer an opportunity to investigate the accident.⁶

³ *Id.* at 27.

⁴ *Id.* at 13.

⁵ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

⁶ *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

Claimant argues that substantial compliance is all that is needed and that claimant has substantially complied with the requirements of K.S.A. 44-520.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant's Exhibit 1 to the preliminary hearing transcript, claimant's testimony and Mr. Wells' first statement regarding Claimant's Exhibit 1 were given more weight by the ALJ than Mr. Wells' recanted statement. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he personally observed claimant's and Mr. Wells' testimony. The ALJ's finding that claimant sustained his burden of proof on the issue of notice is supported by the evidence and shall not be disturbed. Moreover, in applying the *Pike* analysis to the facts of this case, the purpose of K.S.A. 44-520 has been satisfied.

This is an appeal from a preliminary hearing order. Accordingly, the Board's review of preliminary hearing orders and findings is limited. Not every alleged error in law or fact is subject to review.

The implicit finding that claimant satisfies the definition of being temporarily and totally disabled as set forth in K.S.A. 44-510c is not one of the issues denoted as a jurisdictional issue in K.S.A. 44-534a and subject to Board review from a preliminary hearing order, which are, namely, (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses

apply. The term “certain defenses” refers to defenses that challenge the compensability of the injury under the Workers Compensation Act.⁷

In addition, the Board has the jurisdiction to review allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2008 Supp. 44-551(i)(2)(A) provides:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge’s jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .

The ALJ had the authority to determine claimant’s right to receive temporary total disability benefits as K.S.A. 44-534a(a)(2) provides: “Upon a preliminary finding that the injury to the employee is compensable . . . the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation” And the jurisdiction and authority to enter such order is not affected by whether the issue was decided correctly or incorrectly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁸

In conclusion, the Board does not have the jurisdiction or authority at this juncture to review the implicit finding that claimant satisfied the definition of being temporarily and totally disabled.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the Board affirms the October 27, 2009, preliminary hearing Order entered by ALJ Klein.

⁷ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁸ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁹ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of January, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge